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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are nonimmigrant aliens a suspect class for whom strict scrutiny equal protection analysis should be applied to invalidate the rationally-based admission, tuition, and fee policies of public colleges and universities?

2. Does an automatic violation of the supremacy clause follow from a denial of equal protection to nonimmigrant aliens in the granting of "in-state" benefits?

3. Did the lower courts fail to give proper effect to *Toll v. Moreno*, 441 U.S. 458 (1979), and to other decisions of this Court when they concluded that the University of Maryland's policy created an irrebuttable presumption violative of due process until June 23, 1978?

4. Should *Vlandis v. Kline*, 412 U.S. 441 (1973), be overruled?

5. Is the eleventh amendment a bar to the retroactive tuition refunds that the lower courts ordered on the premise that they could reaffirm the district court's order of July 13, 1976, which this Court's decision in *Toll v. Moreno*, 441 U.S. 458 (1979), had effectively vacated?

PARTIES

The parties to the proceeding in the court of appeals were John S. Toll, President, University of Maryland, and the University of Maryland, as the appellants; and Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg, and Renee Otero, Jr., as the appellees.

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PETITION FOR WRIT OF CERTIORARI

John S. Toll, President of the University of Maryland, and the University of Maryland, pray that a writ of certiorari issue to review the judgment entered in this case on March 26, 1981, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), and is reprinted in the separately bound appendix to this petition (App. la). The opinions of the United States District Court for the District of Maryland that occasioned the appeal are reported as *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979), and *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980); these opinions are reprinted in the appendix (App. lla & 29a respectively).

This litigation has produced a number of additional opinions, including two of this Court. The first opinion of the district court is reported as *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), and is reprinted in the appendix (App. 55a). While the affirmance of this decision is reported as *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), the per curiam opinion of the court of appeals was not reported and is reprinted in the appendix (App. 101a). After granting certiorari, *Elkins v. Moreno*, 434 U.S. 888 (1977), this Court, after briefing and argument, issued its first opinion, *Elkins v. Moreno*, 435 U.S. 647 (1978), which is reprinted in the appendix (App. 105a), certifying a question of state law to the Court of Appeals of Maryland. The opinion of the Maryland court is reported as *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), and is reprinted in the appendix (App. 137a). This Court's second opinion, reported as *Toll v. Moreno*, 441 U.S. 458 (1979), which is reprinted in the appendix (App. 157a), vacated the judgment of the United States Court of Appeals for the Fourth Circuit and remanded the case to the United States District Court for the District of Maryland for further consideration.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1981. The jurisdiction of this Court rests on the Constitution, article III, section 2, clauses 1 and 2, 28 U.S.C. § 1254(1) (1976), and 28 U.S.C. § 2101(c) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Article I, section 8, clause 4:

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization.

Article VI, clause 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIV, section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 8, section 1101(a)(15) (1976) is reprinted in the appendix (App. 162a).

University of Maryland Policies

The policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes is reprinted in the appendix (App. 167a).

A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens is reprinted in the appendix (App. 172a).

STATEMENT

A. Introduction

Most public institutions of higher education in the United States, including the University of Maryland, accord preferential admission and charge lower tuition rates and fees to "in-state" or "resident" students. For *eligible* classes of students, domicile is the key to in-state or resident status.[1] A number of groups of students, however, are routinely excluded without reference to their domicile. At the University of Maryland, for example, the in-state policy denies benefits to members of the Armed

[1] The in-state policy of the University of Maryland, which is reprinted in the appendix (App. 167a), lists a number of non-exclusive indicia of domicile that are used to determine a student's status. These include presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments. If the student is financially dependent on a parent or spouse, the status of the parent or spouse rather than of the student is looked to in making the determination.

Forces who are assigned by the military to attend the institution for educational purposes. Also excluded are students who are financially dependent on parents or a spouse not domiciled in the State. The final circumstance in which the student's domicile is ignored by the University of Maryland, in a policy common to those of most public colleges and universities in the nation,[2] is where nonimmigrant aliens are involved;[3] only United States citizens and "immigrant aliens lawfully admitted for permanent residence" are eligible for in-state benefits.

[2] This fact explains why the American Council on Education, the nation's largest and foremost association of colleges and universities, as well as 28 States, filed an *amici curiae* brief in this Court supporting the petitioner in Elkins v. Moreno (App. 105a), 435 U.S. 647 (1978).

[3] As defined by the immigration law, 8 U.S.C. § 1101(a)(15) (1976), which is reprinted in the appendix (App. 162a), there are twelve general categories of nonimmigrants: ambassadors and diplomats and their families (A-visa); temporary visitors for business or pleasure (B-visa); aliens in transit (C-visa); alien crewmen (D-visa); traders and investors (E-visa); foreign students (F-visa); officers and employees of and representatives to international organizations (G-visa); temporary workers (H-visa); foreign journalists (I-visa); exchange visitors (J-visa); fiancees or fiances of U.S. Citizens (K-visa); and intra-company transfers (L-visa).

As noted by one scholar, nonimmigrant aliens "do not share all the burdens that are imposed on residents of the country . . . [and] [i]n many respects their position is similar to that of nonresident citizens who are temporarily present in the state." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. On the other hand, resident aliens, like citizens "serve in the Armed Forces and were subject to conscription under the selective service laws. They pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law [and] enter the United States with the intention of making this country their home." Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 Mich. L. Rev. 1092, 1110-11 (1977).

On the basis of alien address reports, as of January 1977, there were 58,035 permanent resident aliens and 8,391 nonimmigrants in Maryland. *1977 Annual Report: Immigration and Naturalization Service* at 108.

By its terms and operation, the University of Maryland's in-state policy benefits many aliens. In the fall of 1979, for example, there were 1255 permanent resident aliens registered at the three principal undergraduate campuses of the University, and nearly 1000 of these were in-state students subject to lower tuition and fee rates. By contrast, only 493 nonimmigrants, classified as out-of-state students, were registered at that time.

B. Previous Court Proceedings

On May 27, 1975, three of the named respondents, nonimmigrant aliens holding G-4 visas[4] and children of employees of certain international banks based in Washington, D.C., who were then undergraduate students at the University of Maryland, brought a class action suit in the United States District Court for the District of Maryland against the University of Maryland and its then-President, Dr. Wilson H. Elkins. The respondents challenged the constitutionality of the University's policy of granting admission on a preferential basis and charging lower tuition and fees to in-state students. Alleging jurisdiction under 28 U.S.C. §§ 1343(3) & (4) (1976), the international bank students contended that by excluding nonimmigrants from in-state benefits, the policy created an irrebuttable presumption of nondomicile in violation of

[4] G-4 aliens are a group of nonimmigrants comprised of "officers or employees of international organizations and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv)(1976). The respondents' fathers were employed by the International Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank). Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502, Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d)(1976); 26 U.S.C. § 893(a)(1976).

due process and denied them equal protection of the laws by discriminating against them because of their alienage.

On cross motions for summary judgment, the district court held on July 13, 1976, that the in-state policy as applied to G-4 aliens violated due process and enjoined its enforcement (App. 55a). *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976). The court did not decide the students' equal protection claim or the contentions they raised in legal memoranda that the in-state policy interfered with the G-4's treaty tax exemption and constituted a regulation of immigration in violation of the supremacy clause (App. 89a). 420 F. Supp. at 560. On August 3, 1976, the court stayed the injunctive portions of its order on the condition that the University refund tuition and fee differentials to eligible G-4 students in the event the July 13, 1976, order "were finally affirmed on appeal" (App. 99a-100a).

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court on April 27, 1977, in a one-paragraph, unpublished per curiam opinion (App. 101a). *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977). The appellate court later stayed its mandate "on the same terms as the district court namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who timely filed requests for reclassification to 'in-state' status would receive a refund of excess fees paid during the pendency of the stay" (App. 103a-104a).

On October 11, 1977, this Court granted a petition for writ of certiorari to consider whether, in light of *Weinberger v. Salfi*, 422 U.S. 749 (1975), the University's policy created an irrebuttable presumption. *Elkins v. Moreno*, 434 U.S. 888 (1977). Following argument, the Court (with two dissents) sua sponte ordered certified to the Court of Appeals of Maryland the question of whether G-4 aliens

can become Maryland domiciliaries (App. 105a, 118a, 124a-25a). *Elkins v. Moreno*, 435 U.S. 647, 662, 668-69 (1978). On February 21, 1979, the Maryland court held that G-4 aliens could be domiciled in Maryland under common law principles (App. 137a, 156a). *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019 (1979).[5]

Eight months before the latter decision, on June 23, 1978, the Board of Regents of the University of Maryland had adopted, and transmitted to this Court and the Court of Appeals of Maryland, "A Resolution Clarifying the Purposes, Meaning, and Application of the [In-State Policy] Insofar As It Denies In-State Status to Nonimmigrant Aliens" (App. 172a). The clarifying resolution reaffirmed the in-state policy; reiterated its rational bases, including the principle that the costs of a public college or university education should be equalized between various classes in measure to their contributions to the State's economy; and asserted that these rationales were served regardless of whether the policy "conforms with the generally or otherwise applicable definition of domicile under the Maryland common law" (App. 174a).

On April 30, 1979, this Court issued its second opinion, which stated in relevant part:

> Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can" acquire such domicile. 435 U.S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount"

[5] Dr. John S. Toll, who became President of the University of Maryland on July 1, 1978, was substituted as a party for Dr. Elkins while the case was pending before the Court of Appeals of Maryland.

> policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by *Salfi*." . . . *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court. We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

(App. 157a, 160a) *Toll v. Moreno*, 441 U.S. 458, 461-62 (1979).

Subsequently, the district court, again utilizing irrebuttable presumption analysis, held on October 31, 1979, that the University's in-state policy violated due process before June 23, 1978. Nevertheless, the court ruled that the identical policy, applied the same way, with identical results, did not create an unconstitutional irrebuttable presumption after the date of the clarifying resolution (App. 11a, 27a-28a). *Moreno v. Toll*, 480 F. Supp. 1116, 1125 (D. Md. 1979).[6] The court also concluded that the clarifying resolution, although it did not alter the language or operation of the in-state policy, was nevertheless a "change in that policy" that could not be given "retroactive effect" to deny the students their claim to refunds from the July 13, 1976, date of the court's initial order (App. 27a). *Moreno v. Toll*, 480 F. Supp. at 1124. The court requested proposed orders from counsel to effectuate

[6] The district court reasoned in a circular fashion that the Board of Regents' clarifying resolution took the policy out of the irrebuttable presumption mold because "[g]iven the University's definition of domicile, which by its terms excludes nonimmigrant aliens, it is universally true that G-4 aliens cannot qualify" (App. 28a). 480 F. Supp. at 1125. In its first opinion, the district court implicitly rejected a similar argument by the University that its definition on domicile could differ from the common law applications of domicile in other contexts (R. 241-47).

these refunds, and the petitioners objected that a requirement of retroactive monetary relief would offend thet eleventh amendment because the condition on which possible refunds had been premised in the stay orders had not been fulfilled.

On April 17, 1980, the district court further held that the in-state policy discriminated against nonimmigrant aliens and interfered with Congress' exclusive control over immigration (App. 29a, 44a, 46a-47a). *Moreno v. Toll*, 489 F. Supp. 658, 667, 668 (D. Md. 1980). After additional correspondence and a conference with counsel, in which the petitioners reiterated their objections to retroactive monetary relief, the court issued an order on May 30, 1980, declaring the in-state policy unconstitutional on due process grounds before June 23, 1978, and unconstitutional on equal protection and supremacy clause grounds before, on, and after June 23, 1978 (App. 48a). In an attempt to circumvent the eleventh amendment problem, the court purported to reaffirm its order of July 13, 1976. In addition, retroactive monetary relief was ordered for a four year period, even though the policy had been declared constitutional on due process grounds for the period after June 1978 and was not invalidated on other constitutional grounds until April 1980. Immediately thereafter, Dr. Toll appealed from this order granting an injunction and sought and obtained a stay of the court's order (App. 52a).[7]

On March 26, 1981, in a per curiam opinion, the United States Court of Appeals for the Fourth Circuit affirmed

[7] Although the University of Maryland had been dismissed as a party to the case in 1976, the judgment was entered "AGAINST DEFENDANTS." Thus, both the University and Dr. Toll joined in the notice of appeal. Subsequently, the district court entered an amended judgment in favor of the University and against Dr. Toll, but the appeal had already been docketed. For this reason, the petitioners joined in an amended notice of appeal. *See* Fed. R. Civ. P. 60(a).

the decision of the district court (App. 1a). *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981). The appellate court essentially adopted the opinion of the lower court on the due process, equal protection, and supremacy clause issues and affirmed for "reasons sufficiently stated in the opinion[s] of the district court" (App. 5a, 6a). 645 F.2d at 220.

Thus, the decisions below concluded that a classification disadvantaging nonimmigrant aliens is based upon alienage, affects a "suspect class," and must therefore be justified by a compelling interest. In so doing, these courts held that the term "resident alien" in decisions of this Court included immigrants as well as nonimmigrants (App. 37a), 489 F. Supp. at 663, rather than only those aliens who "are obligated to pay their full share of taxes," *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), and who "may be called into the armed forces." *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

The decisions below did not mention the overwhelming number of aliens who qualify under the University's policy. The lower courts found "immaterial" that an effect of the policy was to deny in-state status to large numbers of *citizens*, specifically, out-of-staters and certain military personnel (App. 39a). 489 F. Supp. at 664. They refused to rely upon language in *Foley v. Connelie*, 435 U.S. 291 (1978), indicating that strict judicial scrutiny is applicable only to alienage classifications denying "necessities of life," and instead concluded that *Nyquist v. Mauclet*, a 5-4 decision involving a state educational scheme pointedly disadvantaging permanent resident aliens — rather that nonimmigrants — governed their inquiry.

Finally, the lower courts declined to follow the view of the only two members of this Court who had previously spoken on the question and concluded that *Mauclet* was

not controlling in this case (App. 131a-32a n.6), *Elkins v. Moreno*, 435 U.S. 647, 677, n.6 (opinion of Rehnquist, J., joined by Burger, C.J., dissenting from certification), denigrating their remarks as "merely dicta in a dissenting opinion" (App. 41a n.13). 489 F. Supp. at 665 n.13.[8] Thus, they applied strict scrutiny equal protection analysis to the in-state policy and concluded that none of the justifications for the policy furthered a compelling interest, although some were or might be permissible under a rational basis inquiry (App. 42a-43a). 489 F. Supp. at 666. In short, they rejected the University's rationale that a class which avoids substantial payment of income taxes — the major state tax source of funds to operate the University — should not be entitled to in-state tuition rates.[9]

On the supremacy clause issue, the lower courts found that the in-state policy automatically violated the supremacy clause because the policy had failed to pass muster under strict scrutiny equal protection analysis. They concluded that the policy interfered with Congress' exclusive control over immigration solely because they had found invidious discrimination without compelling justification (App. 46a-47a). 489 F. Supp. at 667-68.[10]

On the due process issue the decisions below held that this Court's decision in *Toll v. Moreno* had not removed

[8] The majority opinion in Elkins v. Moreno also suggested that *Mauclet* did not automatically control the result in this case (App. 114a). 435 U.S. at 658.

[9] The University had argued that a sizeable number of nonimmigrants in visa categories "A" and "G" were able to avoid paying federal and state income tax on their salaries and that persons in other nonimmigrant visa categories, although they may pay some income tax, are neither permitted nor expected to remain in this country long enough to make substantial tax contributions to the State of Maryland.

[10] The district court rejected the second prong of the respondents' supremacy clause attack, that is, that the in-state policy interfered with the agreements of the international banks (App. 44a-45a). 489 F. Supp. at 667. This issue was not addressed by the court of appeals.

the irrebuttable presumption issue from the case for the period before June 23, 1978, the date of the Board of Regents' clarifying resolution. Instead, the lower courts held that before that date the in-state policy conclusively and unconstitutionally presumed that aliens could not acquire domicile so as to qualify for in-state benefits. Without comment, the lower courts passed over the University's contentions that the district court itself had actually decided in July 1976 that the in-state policy could not be rationally justified on the basis of cost equalization or administrative convenience (App. 88a), 420 F. Supp. at 560, in misreliance upon *Vlandis v. Kline*, 412 U.S. 441 (1973).[11]

Specifically addressing the refund question, the court of appeals held that the University had waived its eleventh amendment immunity by agreeing to pay refunds as a condition for obtaining a stay of the district court's order in 1976.[12] The appellate court refused to take note of the express limitation on the University's liability contained in the stay order, that is, that the district court order be "finally affirmed on appeal," rather than be vacated as occurred as a result of this Court's action in *Toll v. Moreno*, 441 U.S. 458 (1979).

On April 15, 1981 (and again on May 11 and June 9), the court of appeals stayed the issuance of its mandate

[11] In July 1976 the lower court as well as counsel were unaware that Weinberger v. Salfi, 422 U.S. 749 (1975), had so cut back on Vlandis v. Kline, 412 U.S. 441 (1973), that the *mere assertion* of a cost equalization rationale (which had been rejected in *Vlandis*) could now defeat a due process irrebuttable presumption challenge. In 1976, in the district court, the case was argued by both sides and decided by the court on the false premise that *only* a "universally true" presumption of nondomicile for G-4 aliens could survive constitutional attack.

[12] The district court resolved the refund issue in a different fashion. It construed the June 1978 clarifying resolution of the Board of Regents as a retroactive substantive policy change that could not be given effect to deprive the international bank students of their supposedly vested rights to refunds (App. 26a-27a). 480 F. Supp. 1124-25.

pending the University's filing of a petition for writ of certiorari with this Court.

REASONS FOR GRANTING THE WRIT

I.

IN CONCLUDING THAT GRANTING A LOWER EDUCATIONAL SUBSIDY TO NONIMMIGRANT ALIENS TRIGGERS STRICT SCRUTINY EQUAL PROTECTION ANALYSIS, THE LOWER COURTS OVER-EXTENDED THE ALIEN/SUSPECT CLASS DOCTRINE BEYOND THE REASONABLE BOUNDS OF ANY DECISION OF THIS COURT AND ACTED IN DIRECT CONFLICT WITH THE VIEWS OF OTHER COURTS AND COMMENTATORS.

When certiorari was granted in this case in 1977 on a single constitutional question, involving a single subclass of nonimmigrants, the stakes were sufficiently high that a majority of the States joined as amici curiae in support of the University of Maryland in urging reversal. Now, in its present and final posture, this case raises far greater issues. Foremost among these is the lower courts' invalidation on equal protection and supremacy clause grounds of the line drawn by most public college and universities in the United States between those classes that qualify for in-state admissions standards, tuition, and fees and those classes that do not.[13]

The petitioners have advanced only "rational bases" for the exclusion of nonimmigrants from in-state benefits, including the fact that as a general proposition members of the nonimmigrant class, either because of state income tax exemptions or their limited stay in this country, do not

[13] The decisions below, if allowed to stand, would permit *all* categories of nonimmigrants including foreign students (F & J visa holders) to be eligible for in-state benefits. *See* Lok v. INS, 548 F.2d 37, 40 (2d Cir. 1977) ("It is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, see, e.g., 8 U.S.C. § 1101(a)(15)(J) (student).").

make the same contribution to the cost of education at the University as citizens or permanent resident aliens. The lower courts effectively found that the University's in-state policy was rationally based, but insufficient to withstand the strict judicial scrutiny applicable to certain state classifications affecting aliens.

In every case in which this Court has applied the strict scrutiny standard of equal protection review to a state classification affecting aliens, the challenged statute or practice discriminated against permanent resident aliens. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971). In addition, "[t]he Court has taken pains in each of the recent cases to make clear that the plaintiffs were resident aliens, and in explaining why alienage classifications are suspect, it has referred pointedly to the position of resident aliens." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312 n.140. This has caused one scholar to note:

> The Supreme Court . . . has not held it unconstitutional to discriminate against nonimmigrant aliens. It has not even suggested that such aliens are within the class protected under the suspect classification doctrine.

Rosberg, *The Protection of Aliens from Discriminatory Treatment by the Government*, 1977 Sup. Ct. Rev. at 312.[14]

Indicative of the lower courts' misreading of this Court's alienage decisions is their attempt to incorporate nonim-

[14] Professor Rosberg has said that "one has an intuitive sense that the denial of benefits to nonimmigrant aliens rests on a real difference between their position, on the one hand, and the position of both resident aliens and citizens on the other." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312.

migrants within the meaning of the term "resident alien." However, in *Graham v. Richardson*, 403 U.S. 365, 376 (1971), this Court said that "[a]liens like citizens pay taxes and may be called into the armed forces. Unlike . . . short-term residents . . . aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." Similiarly, in *Mauclet*, the majority noted that "[r]esident aliens are obligated to pay their *full share* of the taxes that support the assistance programs." 432 U.S. at 12 (emphasis added). Most nonimmigrants do not live within the State for many years or contribute significantly to its economy. Moreover, G-4 aliens, among other categories of nonimmigrants, are not subject to the full range of state taxes. Finally, nonimmigrants may not be drafted as long as they maintain their nonimmigrant status. 32 C.F.R. § 1611.2 (1980). Thus, it is clear that this Court has not been thinking of nonimmigrants when it has displayed its special solicitude for "resident aliens."[15] *See United States v. Tsuda Maru*, 479 F. Supp. 519 (D. Alas. 1979), in which the court, after citing to a definition of "resident alien" which excluded nonimmigrants, cogently observed:

> The numerous cases which have struck down alienage classifications have all involved resident aliens . . . . These cases have often emphasized that

[15] In fact, one commentator has drawn the following conclusion from the Court's prior handling of this case:

> The Court's restraint in *Elkins* was revealing. Had plaintiffs been resident aliens, the Court would not have hesitated to decide the case. Any definition of domicile designed to exclude *resident* aliens from state welfare or education benefits would clearly be unconstitutional under *Graham*. The Court's decision in *Elkins* implies that nonimmigrant aliens may be restricted by a state's definition of domicile and thus may not be entitled to the "heightened judicial solicitude" extended to resident aliens.

Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069, 1083 (1979). *See also* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. at 312.

> resident aliens live in American communities, must obey our laws, pay taxes, serve in the armed forces, and have made significant contributions to our country . . . It is the burdens which resident aliens bear along with citizens that make absolute bars to aliens qualifying for work and educational opportunities so irrational. Resident aliens are in many respects just like citizens, and classifications which disadvantage them will usually be subjected to strict judicial scrutiny. The philosophical and legal support for the doctrine is completely absent when a case involves a non-resident alien.

See also Matter of Anwo, Interim Decision #2604 at 5-6 (BIA 1977), *aff'd sub nom. Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (The lawful permanent resident "enjoys greater rights than the nonimmigrant alien and assumes commensurate responsibilities and duties."); *Wong v. Board to Trustees of California State Universities and Colleges*, 125 Cal Rptr. 841. (Cal. App. 1975) (upholding the constitutionality of a California statute that denied in-state benefits to nonimmigrants).

Second, so many aliens are eligible for in-state status at the University that it is irrational to contend that the in-state policy denies its benefits on the basis of alienage. In 1978 and 1979 there were more than twice as many permanent resident alien undergraduate students at the University than there were nonimmigrants, and most of the permanent resident aliens qualified for the greater in-state subsidy. And on the basis of alien address reports, there were seven times as many permanent resident aliens in the State of Maryland as there were nonimmigrants. *See* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 313 (A State's "willingness to treat resident aliens as well as it treats citizens strongly suggests that the classification did not arise out of ill will or a stereotyped view of aliens or a desire to exploit a weak minority by imposing burdens on them while giving them few benefits.").

Third, in-state tuition and fees are not "necessities of life." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n.15 (1974). As noted by Chief Justice Burger for the majority in *Foley v. Connelie*, 435 U.S. 291, 295 (1978), all of this Court's cases applying strict scrutiny to state alienage classifications have involved exclusions which "struck at the noncitizen's ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." A dollar differential, not a right to education, is at stake here, an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year. Certainly no claim can be made that professional employees of the World Bank and the Inter-American Development Bank, with their generous array of salaries, fringe benefits (including the legal and other costs of this litigation) and dependency allowances (*see* Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess., at 46-47 (June 15, 1977)), are unable to pay the differential. More importantly, at least for employees at the World Bank, neither the students not their parents need to pay the differential at all, because the bank itself pays it in the form of a "tuition equalization subsidy."

Fourth, strict scrutiny is not applicable where, as here, it is unreasonable to impute to the Federal Government a policy against the University's in-state scheme and, in fact, the in-state policy is consistent with the purposes of federal immigration law.[16] Just like the University of

[16] *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1063-64 (1979) ("Some state alienage-based classifications are sustained and others struck down not really because all the former pass muster under a strict standard of review, whereas all the latter do not, but because only the former can be deemed consonant with implicit federal policy regarding aliens."). *See also* Comment, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 Yale L.J. 940, 959 (1980).

Maryland and other public colleges and universities across the nation, the Federal Government has drawn the line on various benefit schemes between nonimmigrants on one hand and citizens and permanent resident aliens on the other. *See, e.g.*, 42 U.S.C. § 1395(o) (1976) (Medicare benefits) (upheld in *Mathews v. Diaz*, 426 U.S. 67 (1976)); 45 C.F.R. § 177.201 (1980) (excluding nonimmigrant aliens from eligibility for federal, state, and private programs of low interest student loans).[17] This latter regulation makes it absolutely clear that the Federal Government has no policy in favor of according educational benefits to nonimmigrants — in fact, just the opposite. If anything, 45 C.F.R. § 177.201 reflects a purpose of the immigration laws to encourage a change of immigration status to permanent resident alien — a purpose with which the University's in-state policy is entirely consistent.

Finally, two members of this Court have already spoken to the applicable standard to gauge the classification at issue here. Justice Rehnquist, in a opinion joined by Chief Justice Burger, has said:

> Unlike the situation in *Nyquist* [v. Mauclet, 432 U.S. 1 (1977)], the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U.S., at 2, 4, 5-6, and n.6 and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone would seem sufficient to support the line drawn by the University. *See Starns v. Malkerson, supra* [401 U.S. 985 (1977)].

[17] In Mathews v. Diaz, 426 U.S. 67 (1976), this Court upheld the denial of Medicare benefits to nonimmigrants upon application of a rational basis equal protection standard. In so doing, the Court suggested that the only reason state exclusion of some aliens might not be justified is because the state invariably treated out-of-staters and aliens differently. 426 U.S. at 85. The University's in-state policy does not suffer from such a defect in that *both* out-of-staters and nonimmigrants are denied the benefit.

(App. 131a-32a n.6) *Elkins v. Moreno*, 435 U.S. 647, 676, n.6 (1978) (opinion dissenting from certification of question of state law to the Court of Appeals of Maryland).[18]

In summary, the decisions below on the equal protection issue represent an unprincipled exposion of suspect class analysis with manifestly harmful financial consequences for the nation's public college and universities. For these reasons, review by this Court is appropriate.[19]

II.

THE DECISIONS BELOW REPRESENT A CLEARLY UNREASONABLE APPLICATION OF THE PREEMPTION DOCTRINE AT ODDS WITH DECISIONS OF THIS COURT AND IN DISREGARD OF STATE EDUCATIONAL INTERESTS.

In concluding that the exclusion of nonimmigrants from in-state benefits amounted to unconstitutional state regulation of immigration, the lower courts intruded into an area that is principally a matter of state and local concern. The petitioners submit that how a public college or university determines eligibility for preferential admissions standards, tuition, and fees is within the realm of permissible state regulation, and thus the lower courts' supremacy clause decision must be reversed.

In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court said that a state statute which prohi-

[18] In addition to cost equalization, the University proffered the following rational bases for the in-state policy's exclusion of nonimmigrants: limitation of University expenditures; efficient administration of the in-state determination and appeals process; and prevention of disparate treatment among categories of nonimmigrants.

[19] Decisions by this Court in Cabel v. Chavez-Salido, *cert. granted*, ___ U.S. ___, 101 S. Ct. 1511 (1981) (citizenship requirement for peace officer), and Plyler v. Doe, *cert. granted*, ___ U.S. ___, 101 S. Ct. 2044 (1981) (denial of elementary school education to illegal aliens), will not resolve the equal protection issue in this case. However, review of the decisions below, as well as the pending cases, offers the Court an opportunity to decide most of the questions troubling this area of the law.

bited an alien from earning a livelihood so burdened the entrance or residence of aliens as to amount to a regulation of immigration. For the same reason, the Court in *Graham v. Richardson*, 403 U.S. 365 (1971), struck down stringent state residency requirements denying to resident aliens welfare benefits that were essential to life, literally forcing them out of the country. Chief Justice Burger summarized the principle of these cases in *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (emphasis added):

> These exclusions struck at the noncitizen's *ability to exist* in the community, a position seemingly inconsistent with the congressional determination *to admit the alien to permanent residence.*

This preemption doctrine has never been applied to an enactment which disadvantaged only nonimmigrants (rather than all aliens). Moreover, the doctrine has no application to the denial by a State of a benefit that, like a tuition differential, is not a necessity of life. Finally, where, as here, the state regulation is harmonious with the federal scheme, a preemption challenge must fail. *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).[20]

In the present case, the decisions below disregarded these principles to fashion a rule automatically invalidating on supremacy clause grounds every asserted discrimination against an alien subclass. First, the rule of the lower courts is analytically unsound. It suggests that a supremacy clause violation can be justified upon the showing of a compelling interest (App. 47a). 489 F. Supp.

[20] The Federal Government presently denies its educational benefits to G-4's and other nonimmigrants. *See* 45 C.F.R. § 177.201. In addition, it should be noted that employees of most international organizations derive their income tax advantage from federal law, 26 U.S.C. § 893 (1976), and are required to waive their tax exemption upon adjustment of immigration status. The rationale of the University's in-state policy is entirely consistent with this federal policy.

at 668. This is absolutely false. *See Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84, 93 (1963). Moreover, such a per se rule refuses to recognize that this Court on occasion has sustained far-reaching discrimination against aliens without a suggestion that the supremacy clause was implicated. *See Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977).[21]

Finally, the lower courts ignored the rule of *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976), that "even if . . . local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . . ." The University's in-state policy, like those of most public colleges and universities, has absolutely no impact on immigration. For this reason, review by this Court is necessary to correct the lower courts' dangerous supremacy clause precedent.

III.

THE LOWER COURTS REFUSED TO GIVE EFFECT TO THE DECISION IN *TOLL V. MORENO*, 441 U.S. 458 (1979), EMBRACED A CONSTITUTIONAL DOCTRINE DISFAVORED BY THIS COURT, AND ERRONEOUSLY CONCLUDED THAT THE UNIVERSITY'S IN-STATE POLICY CREATED AN IRREBUTTABLE PRESUMPTION VIOLATIVE OF DUE PROCESS PRIOR TO JUNE 1978.

In its rush to save refunds for the international bank students and salvage the remnants of its 1976 opinion, the district court (and, by affirming, the appellate court) has embraced a constitutional doctrine repeatedly shunned by this Court and soundly rejected by many of the circuit courts of appeals. In so doing, the lower courts invalidated what they conceded to be a rationally-based policy and demonstrated the unreasonableness of a constitutional

[21] *Skafte* rejected a preemption challenge, as well as an equal protection challenge, to a State's ban on voting by aliens.

doctrine that can be avoided by the mere assertion of alternate purposes for a statutory or regulatory scheme (*see Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977))[22] — a doctrine that can be avoided, as the decisions below held, by the announcement of a rationale for a policy without any real change in the language, operation, or effect of that policy.

In *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), this Court severely limited the use of irrebuttable presumption analysis out of concern that it had become "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." And after *Salfi*, the doctrine has fallen into extreme disfavor, that is until the present case. As noted by the Court of Appeals for the Nineth Circuit:

> We are aware of no cases since *Salfi* which have relied upon this analysis, with the exception of one brief per curiam opinion in which the facts were squarely governed by [Cleveland Board of Education v.] *LaFleur* [414 U.S. 632 (1974)]. *Turner v. Department of Emp. Security*, 432 U.S. 44, 46, 96 S. Ct. 249, 46 L. Ed. 2d 181 (1975). The Court has declined recent invitations to revive the doctrine. In *Fiallo v. Bell*,

[22] In *Hodory*, the Court rejected an irrebuttable presumption challenge to a statute imposing a disqualification for unemployment benefits when the claimant's unemployment was due to certain labor disputes. In so doing, the Court noted:

> Appellee also claims that [the statute] creates an impermissible "irrebuttable presumption." This argument requires two assumptions. First, appellee must assume that the *only purpose* of the statute is to measure "innocence." Then he must assume that the disqualification provision represents a presumption that any person laid off due to a strike is not innocent. If the statute is *designed to serve any purpose* other than measuring innocence, appellee's implication of an irrebuttable presumption fails. As we discuss below, the statute clearly has purposes other than measuring the innocence of the disqualified worker.

431 U.S. at 490 n.18 (emphasis added).

430 U.S. 787, 791, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977), the appellants raised the conclusive presumption issue, but the Court refused to deal with it in its analysis. Similarly, in *Ohio Bureau of Emp. Serv. v. Hodory*, 431 U.S. 471, 490 n.18, 97 S. Ct. 1898, 52 L Ed. 2d 513 (1977), the Court acknowledged that an irrebuttable presumption argument had been raised, but summarily disposed of it in a footnote. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24, 96 S. Ct. 2282, 49 L. Ed. 2d 752 (1976), such an argument was rejected with a reference to *Salfi*, and in *First National Bank v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 1413, 55 L. Ed. 2d 707 (1978), a conclusive presumption argument raised by the parties in the lower court was not discussed by the Supreme Court. *Cf. Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978) (decision whether to limit or overrule *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), an important irrebuttable presumption case, avoided).

deLaurier v. San Diego Unified School District, 588 F.2d 674, 683 n.16 (9th Cir. 1978).[23] *See also Trafelet v. Thompson*, 594 F.2d 623, 629-30 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979), for another review of this Court's continued disinterest in claimed irrebuttable presumptions and of the dismissal of the doctrine by many of the circuit courts of appeals; J. Nowak, R. Rotunda, & J. Young, *Handbook on Constitutional Law* 497 (1978).

Despite the clear desire of this Court not to employ irrebuttable presumptions to invalidate rationally-based state classifications, the lower courts nevertheless concluded that they had to decide the irrebuttable presumption issue and that it had not been removed from the case. This is a patent misreading of *Toll v. Moreno* (App. 157a),

[23] To the Ninth Circuit's list of Supreme Court cases ignoring or rejecting irrebuttable presumption contentions might be added Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Knebel v. Hein, 429 U.S. 288 (1977); Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977); and Friedman v. Rogers, 440 U.S. 1 (1979).

441 U.S. 458 (1979), and a refusal to adhere to the law of the case. *Toll* left no room for the lower courts to conclude that the district court's 1976 opinion any longer governed, for any period of time, the rights and obligations of the parties. If this Court wanted to reach that result, it would have affirmed the 1977 per curiam decision of the court of appeals, or dismissed the writ of certiorari as improvidently granted. Instead, this Court vacated the judgment of the court of appeals and remanded the case to consider "new" constitutional issues, *viz.*, the equal protection and supremacy clause questions (*see Elkins v. Moreno* (App. 114a & 114a n.7), 435 U.S. at 658 and 658 n.7), not the due process question originally presented to this Court. Moreover, the reason given for the Court's action in *Toll* — that *Vlandis v. Kline* was inapplicable and that therefore the Court need not consider the question of overruling *Vlandis* as modified by *Weinberger v. Salfi* (App. 160a), *Toll v. Moreno*, 441 U.S. at 461-62 — makes it clear that this Court believed that for these parties, and as far as the entire case was concerned, the issue had been obviated. Obviously, if the Court though that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be "overrule[d] or further limit[ed]" (App. 116a). *Elkins v. Moreno*, 435 U.S. at 660.

In short, this Court's conclusion that *Vlandis* is inapplicable to this litigation and that no irrebuttable presumption exists was the law of the case and not subject to reexamination by the lower courts. *See Venido Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (when a case has been once decided by the Supreme Court on appeal, and remanded to the lower court, "whatever was before the Supreme Court, and disposed of by its decree, is considered as finally settled.").

In addition, the lower courts' bifurcated result on the due process question, based on the June 23, 1978, clarifying resolution, demonstrates the analytical bankruptcy of the irrebuttable presumption doctrine. That resolution merely reiterated "rational bases" for the in-state policy argued previously and asserted a cost-equalization rationale present in the record in the district court and in pre-litigation statements of University officials. It did not change the language, operation, or effect of the in-state policy, which denied in-state benefits to nonimmigrants before June 1978, and did so afterwards. To draw a constitutional difference (as did the lower courts) from the issuance of such a resolution recognizes that the irrebuttable presumption doctrine is no more than a paper tiger.

Finally, to deny review is this case, after this Court had once granted certiorari to decide the due process issue and after the case had acquired a history among courts and commentators, would be an open invitation to judges to begin reapplying the disfavored irrebuttable presumption doctrine. *See* Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227, 1286 (1979) ("Judges reason that once the Supreme Court has initially invested the time to consider the merits, or even write a full-blown opinion, it will not allow lower courts to arrive at a decision after remand with which the Court disagrees. Consequently a denial of certiorari, at the very least, may be thought to demonstrate that the Justices have no strong disagreement with the second lower court decision.").

Review of the due process question in this case and overruling *Vlandis v. Kline* are necessary to avoid lower court confusion on the condition of the irrebuttable presumption doctrine. The doctrine has outlived any usefulness it ever had, and the Court should take this opportunity to lay it to rest.

IV.

THE LOWER COURTS' ORDERING OF RETROACTIVE TUITION REFUNDS VIOLATES THE ELEVENTH AMENDMENT AND IS IN CONFLICT WITH DECISIONS OF THIS COURT.

It is apparent that the district court on remand from this Court reached out to decide the irrebuttable presumption question for the 1976-78 period, to construe the June 28, 1978, clarifying resolution as a retroactive substantive policy change, and to reaffirm its July 1976 order solely to enable the international bank students to claim refunds to in-state tuition from the State of Maryland. However, the district court's handling of the refund issue, as well as the endorsement of the Fourth Circuit, cannot be squared with the terms of the August 1976 stay order, the eleventh amendment to the Constitution, or common sense.

First, the July 13, 1976, district court order was effectively vacated when this Court vacated the judgment of the court of appeals on April 30, 1979. Moreover, as a legal and practical matter, the old district court order could not exist at the same time as that court was assuming jurisdiction to decide again the irrebuttable presumption issue. *See Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936) (appellate court could not leave in effective operation the final decree of the district court and at the same time reinvest that court with jurisdiction to retry the case). At that point, the old order was a nullity and the University's in-state policy was presumably (and in the petitioners' view, in fact) constitutional. By entering a new order in 1980 reaffirming the 1976 order and expressly mandating retroactive refunds, the lower court was obviously trying to circumvent the eleventh amendment's ban on the award of monetary relief against the state. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977).

Second, the lower courts compounded their error and the violation of the State's eleventh amendment rights by ordering retroactive monetary relief for the post-June 23, 1978 period, even though the in-state policy had been declared constitutional on due process grounds after that date (App. 28a), 480 F. Supp. at 1125, and was not declared unconstitutional on different grounds until May 30, 1980. Although styled a reaffirmation of the 1976 order, the May 30, 1980, order for the first time required relief on the basis of two issues not decided until 1980 (one of which — the supremacy clause question — had not even appeared in the initial complaint).

Third, although the University was willing to make refunds as a condition of obtaining the stay of August 3, 1976, this can be regarded as a waiver of eleventh amendment immunity *only* to the extent indicated, i.e., refunds would be made if "the Court's Order of July 13, 1976, were finally affirmed on appeal" (App. 100a). *See Edelman v. Jordan*, 415 U.S. at 673 ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1908).").

Clearly, the terms under which refunds would be available under the stay order were not met. The University was successful in this Court and the judgment of the court of appeals and the 1976 order were vacated. In fact, the 1976 order has never been — and never can be — "finally affirmed on appeal." Moreover, the University's understanding of the terms of 1976 stay is consistent with the view the court of appeals took in 1977 when it stayed its mandate pending the University's filing of a petition for certiorari. That stay order was entered "on the same terms as the district court originally granted its stay namely that should the appellant's petition for writ of

certiorari prove unsuccessful" refunds would be available to eligible students (App. 104a). It is apparent that in light of the history of the *Moreno* litigation and the plain language of the stay order, the University has not waived its eleventh amendment immunity. For this additional reason, review of the judgment of the court of appeals is appropriate.

CONCLUSION

This case raises novel and important questions of constitutional law that transcend the huge amounts of money at stake for public colleges and universities across the nation. Moreover, it presents a suitable vehicle for review and resolution of several open constitutional questions, including whether strict scrutiny equal protection analysis should be applied when nonimmigrants receive diminished economic benefits from a State and whether irrebuttable presumption due process analysis should continue to be employed. As demonstrated by the decisions below, answers to the questions raised by this petition are needed to prevent the lower federal courts from continuing to stray from the principles that have guided this Court's recent decisions. For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit to review the judgment it entered in this case on March 26, 1981.

Respectfully submitted,

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